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NO. 276

IN THE

Supreme Court of the United States

October Term
1961

EMMETT GRAY, *Petitioner*
versus
EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., *Repondents*

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY EMMETT GRAY, PETITIONER

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To The Honorable, The Chief Justice of The United States
And The Associate Justices of The Supreme Court
of The United States:

Maritime Overseas Corporation is not named as a respondent in the petition of Emmett Gray for Writ of

Certiorari. However, inasmuch as the relief prayed for by Petitioner in the prayer of his petition, if granted, would be prejudicial to the position of Maritime Overseas Corporation, it files this opposition thereto, denying jurisdiction, and denying error, and respectfully prays that the petition of Emmett Gray herein be denied.

Questions Presented For Review

It is the position of Maritime Overseas Corporation that there are no questions properly presented for this Court's review in this case, because the decisions of the District Court and the Court of Appeals were the result of the application of well settled legal principles to facts found on competent evidence. However, if there are any questions to be passed upon by this Court, we certainly do not agree that they are correctly stated in the petition, and those purported questions are therefore challenged as follows:

I.

This case does not present, as Petitioner contends in Article I of its petition, the question of whether a "pilotage" clause of the type generally used in American harbors is lawful. In the first place, the pilotage clause here involved was not of the type generally used in American harbors because it was not restricted to those vessels which were maneuvering under their own power in control of their own crews. Morever, this was not a case, as Petitioner states in his petition, where an ocean going vessel with her master in command upon her bridge and with a full crew at their stations was being shifted by tugs. Instead, this was a case where a dead ship, the main engines of which were dismantled and inoperative, and the helm of which was lashed, was being towed from one berth to another within

the confines of Galveston harbor solely by tug power, and under the command of a towing company employee, the Petitioner Gray, who was furnished by the towing company on its own initiative, not at the request of the vessel to be towed, to direct the shifting operation. This towing company employee, Captain Gray, was on the bridge of the ship actually directing the movement, and although the master of the ship was also on the bridge he was not commanding, and in fact could not command the operation as he was unable to direct the tugs and unable to move his ship in any direction by the use of her own rudder and wheel. There was not, as Petitioner states, a full crew at their stations; there were no engine room personnel at their stations because the engines were inoperable; there was no helmsman at the wheel because the helm was lashed amidships; there was no mate at the engine order telegraph because it was secured. Although Captain Gray was the holder of a pilot's license from the Federal government, he was not a state licensed bar pilot or a member of the Galveston Pilots Association, but was simply the employee of the towing company furnished by the latter to conduct the towing operation. Maritime Overseas Corporation made no contract with Captain Gray to pilot the M/V "Har Canaan", and they paid him no fee for his services. Neither is it true, as is stated in Article I of the petition, that the master ordered the ship's crew to drop the vessel's anchor. It was found as a fact by the District Court in no less than three separate findings (See Findings of Fact No. 17, 18 and 21, R. 883 and 884) that Captain Gray, not the master, issued the order to drop the anchor, and this was an act performed in the course of the towage operation.

While it is true, as Petitioner states, that the towage contract contained no words attempting to relieve the

tugs or their owners from liability for negligent towage, the contract did purport or attempt to relieve the towing company from liability for the negligence of a pilot. Starting with this premise, the towing company then attempts to denominate the employee furnished by it to conduct a towing operation a "pilot" and to denominate the towage service performed "pilotage", and to thereby do by indirection what it could not do directly, that is, to relieve itself from liability for negligent towage. Thus, the question, if any, is not whether Your Honors held in *Bisso v. Inland Waterways Corporation* (1955), 349 U.S. 85, that pilotage clause was invalid, but whether the Courts below in the instant case were correct in holding in accordance with the rule announced by Your Honors in the *Bisso* decision, that a clause which would in effect exempt a towing company from liability for the negligence of its towing employees was invalid and unenforceable regardless of the fact that the towing company attempted to denominate the service which it performed "pilotage" and regardless of the fact that the towing company attempted to denominate its employee a "pilot". The question, if any, we submit was laid to rest by the decision of the Court of Appeals, 287 F. 2d 852 at P. 854 where it was said:

> "Of this, we think it sufficient to say that we agree: with the District Judge's conclusion that the Libellants, strangers to the contract, cannot, of course, be held bound or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that Appellants are bound and precluded by the decision and holding in *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 911, that such a clause is invalid. In addition, we think it clear, that respondents' reliance on *Sun Oil Co. vs. Dalzell Towing Co.*, 287 U.S. 291, 53

> S. Ct. 135, 77 L. Ed. 311, will not at all do here, both because of the decision in the *Bisso* case, which, on full consideration, rejected the *Dalzell* case as authority for the position here taken, and because the *Dalzell* case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in this case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain, who, though denominated 'pilot' was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the *Bisso* case, and the judgment denying effect to the invoked clause of the contract must be affirmed."

None of the cases cited by the Petitioner in Article I of its brief for the proposition that a pilotage clause is valid is in point in this case, because all of those cases involve situations in which the vessels were actually being controlled by their own crews through the use of their own propulsion and steering machinery and were merely being *assisted* by the pilot and the tugs. They were not cases, as was the one at bar, wherein a ship, without the use of her own propulsion machinery or rudder, and having no control over her own movements, was being moved entirely by tug power under the direction of a towing company employee. Thus, we repeat that the question, if any, is not whether Your Honors held in *Bisso v. Inland Waterways Corp.*, supra,

that a *pilotage* clause is invalid, but whether the Courts below were correct in holding, in accordance with the *Bisso* decision, that such a *pilotage* clause cannot be enforced in a case where it has been found as a matter of fact that *towage* and not pilotage was involved.

Moreover, it will be noted that the District Judge, in his memorandum opinion in this case (R. 873), held that even if the so-called pilotage clause were valid, it would not preclude an award of indemnity to Maritime Overseas Corporation against Captain Emmett Gray because he was not a party to the towing contract, and the said contract was not made for his benefit. This holding was specifically approved by the Court of Appeals (287 F. 2d 852, at P. 854). Hence, the question of validity of the so-called pilotage clause is entirely immaterial to Captain Gray, and has no place in his petition for Writ of Certiorari as any decision regarding the validity of that clause would not affect Gray's liability for indemnity to Maritime Overseas Corporation.

II.

The questions alleged to be presented for review by Petitioner Gray, in Article II of his petition, has to do with the failure of the courts below to accurately mark the pipelines in question, and accordingly, do not affect Maritime Overseas Corporation. However, the Court's attention is invited to the fact that the identification of Captain Gray as a "pilot" throughout the statement of this question is erroneous, Captain Gray having been held to be no more than the towing company employee charged with the responsibility of conducting the towage operation (Please see the opinion of the Court of Appeals in this case, 287 F. 2d 852, at P. 854).

III.

In his statement of the third question purportedly presented for review of this Court (Article III of the petition) Petitioner Gray again misstates the record in this case. This was not a case, as Petitioner states, of a vessel in command of her master with a full crew aboard at their stations being shifted by tugs in a harbor. The District Court found that although the master of the M/V "Har Canaan" was on her bridge, he was not commanding the ship, as the ship did not have the use of her own propulsion or rudder power, and was being moved solely by the tugs which the master was unable to command. Instead, the Court found that Captain Gray, the towing company employee furnished by G & H Towing Co. to be in charge of the overall towing operation, had assumed the conning of the vessel. Captain Gray was not a state licensed bar pilot, and was not a member of the Galveston Pilots Association; he was a full time regular towing company employee, and he made no contract of pilotage with Maritime Overseas Corporation as operator of the M/V "Har Canaan". Again, in this section of his petition, Petitioner states, and again erroneously, that Captain Gray was acting only in an advisory capacity, and that the master of the M/V "Har Canaan" gave the order to drop the vessel's anchor. This is directly contrary to the findings of the District Court, which findings were undisturbed by the Court of Appeals. The District Court found that Captain Gray had assumed the conning of the M/V "Har Canaan" (Finding of Fact No. 13, 882), and that Captain Gray, not the master, gave the order to drop the ship's anchor (Findings of Fact No. 17, 18 and 21, R. 883 and 884). Although the M/V "Har Canaan" was found to be liable in rem, because of the negligence

of Captain Gray who was in charge of her, no in personam liability was found against her claimant, Maritime Overseas Corporation, because neither the master nor any other member of the crew was negligent (Findings of Fact Nos. 21 and 22, R. 884). Hence, the question, if any, is not as stated by Petitioner, whether the vessel was a joint tort feasor with Captain Gray and not entitled to contribution from Gray in accordance with the rule of *Halcycon Lines v. Haenn Ship Co.*, 342 U.S. 282, but whether the Courts below properly held that this was not a joint tort feasor situation at all, but one in which the vessel was held jointly liable solely because of the negligence of Captain Gray, and, therefore, entitled to indemnity (not contribution) against Gray in accordance with the fundamental well settled legal principal that where a vessel is caused to incur in rem liability solely through the negligence of a party not an employee of the vessel owner or operator, the vessel's claimant is entitled to indemnity therefor against the wrongdoer. The decision in the *Halcycon Lines* case has nothing to do with the case at bar because Halcycon involved contribution, as distinguished from indemnity here involved, and joint tort feasors, as distinguished from joint liability. Moreover, the *Halcycon* rule applies only in non-collision cases, and the case at bar is a collision case.

Statement

The incidents giving rise to this litigation occurred on March 21, 1958. At that time, the M/V "Har Canaan", a foreign flag ship, was undergoing repairs on her main engine, which was partly dismantled and inoperative. Her wheel was lashed with her rudder amidship and her engine telegraph was secured. (R. 667, 671). Her master and third

mate were on her bridge and her chief officer and seamen were by her anchors. Her crew was aboard, but under the circumstances were little more than passengers. The ship was scheduled to be shifted from Pier 15 to the Sunset Grain Elevator at Slip A within the Port of Galveston, Texas (Finding of Fact No. 8, R. 879). It was therefore necessary for this shift to be made entirely by tug power (R. 671). Accordingly, Maritime Overseas Corporation's Galveston agent called the office of G & H Towing Company, at Pier 10, Galveston, advised the said G & H Towing Company, which was the only towing company furnishing harbor tugs in the Port of Galveston, Texas (Finding of Fact No. 10, R. 880), that the "Har Canaan" should be shifted at 12:00 noon as a "dead ship" from Pier 15 to Sunset Elevator, and asked the said G & H Towing Company to handle the shifting operation. The three tugs, directions as to their positioning, all maneuvers, and the entire operation were under the sole control of G & H Towing Co., and Maritime Overseas Corporation was interested only in the ultimate result of having the ship berthed at Sunset Grain Elevator. The anchor of this particular vessel is dropped by merely releasing a brake at the electric anchor windlass and its weight carries it out. The ship's master was an infrequent caller at the port, a stranger to the area of the Slip A vicinity, had no knowledge about the pipelines in the vicinity, and had no pilot's license for the port. The ship's agent, in notifying G & H Towing Company when to shift the M/V "Har Canaan", did not specify the number or type of tugs that were to be supplied for the operation, nor did he request that G & H Towing Company furnish a pilot for the operation (R. 726). In response to this telephone conversation, G & H Towing Company furnished the three tugs that moved the ship, and also sent along,

on its own initiative, and for its own benefit and convenience, its port captain and so-called "dead ship" pilot, Captain Emmett Gray, a regular employee of G & H Towing Company, to direct the movement of the flotilla (R. 162). The three tugs so furnished by G & H Towing Company, under the direction of Captain Gray, its employee, supplied the sole motive, maneuvering, navigating and directional power for the movement of the ship throughout the entire operation, and the said Captain Gray, Petitioner herein, gave all orders during the shifting operation, (R. 671, 673, 674). We call attention, at this point, to our quotation from the opinion of the Court of Appeals on Page 4 hereof.

As the flotilla was approaching, and/or entering Slip A, Captain Gray, the employee furnished by G & H Towing Company to be in charge of the overall towing operation, gave the order to drop the ship's port anchor (Findings of Fact Nos. 14 and 17, R. 882, 883 and 884). The anchor brake of the M/V "Har Canaan" was released and the anchor accordingly was dropped as directed, and resulted, according to the findings of the District Court, undisturbed by the Court of Appeals, in damage to one or both of two sub-aqueous pipelines in which the named respondents herein were interested.

The District Court found, upon abundant credible evidence, that Captain Emmett Gray was acting as the employee of G & H Towing Company, at all times material hereto, and was not a loaned servant to the vessel or her operators (Finding of Fact No. 20, R. 884); that the master of the M/V "Har Canaan" was not negligent in failing to intervene or displace Captain Gray (Finding of Fact No. 21, R. 884), and that neither he nor any other officer or member of the crew of the M/V "Har Canaan"

was in any way negligent (Finding of Fact No. 22, R. 884). The Court concluded that G & H Towing Company was liable for the negligence of Captain Gray as its employee (Conclusion of Law No. 2, R. 885), and that the M/V "Har Canaan" was liable "in rem" for the negligence of Captain Gray because he was lawfully in charge of her. No in personam liability was found against Maritime Overseas Corporation, claimant of the M/V "Har Canaan". The District Court awarded indemnity to Maritime Overseas Corporation, as claimant of the M/V "Har Canaan", against Captain Gray and his employer, G & H Towing Company for the "in rem" liability imposed against the M/V "Har Canaan" by reason of the negligent act of Captain Gray (Conclusion of Law No. 7, R. 897); and held that the so-called "pilotage" clause in the contract between Bay-Houston Towing Co. and Maritime Overseas Corporation did not shift the responsibility for Gray's negligence from Gray and G & H to Maritime Overseas Corporation; that this was in fact a towage operation, not a pilotage operation, and that such release towing agreements and recitations of employer-employee relationships when none in fact existed had been held by this Court to be invalid as against public policy in *William A. Bisso v. Inland Waterways Corporation*, supra. Finally, the District Court concluded that even if the so-called pilotage clause were not void under the *Bisso* decision, and even if it were sufficiently broad to afford to G & H Towing Co. a basis for indemnity against Maritime Overseas Corporation (which it was held not to be, R. 873), that it would furnish no protection whatever to Gray because he was not a party to the contract, and it was not made for his benefit (R. 873).

The Fifth Circuit Court of Appeals affirmed the holding of the trial court that the negligence of Captain Gray alone

was responsible for the damages in the case, and that Maritime Overseas Corporation, whose vessel, the M/V "Har Canaan", was held liable in rem solely because of the negligence of Captain Gray, was entitled to indemnity against the said Captain Gray and against his employer, G & H Towing Company for the in rem liability imposed against the ship by reason of Gray's negligence. The Court of Appeals specifically approved the District Court's holding that the so-called pilotage clause was inapplicable and as a defense was invalid, and did not suffice to impose liability against Maritime Overseas Corporation for the negligence of Captain Gray, because this was, under the proven facts, a towage situation, not a pilotage situation, and the exculpatory clause, being an attempt to release a towing company from liability for its own negligence, was void as against public policy under the holding of this Court in *William A. Bisso v. Inland Waterways Corporation*, supra. (Please see the opinion of the Court of Appeals at 287 F. 2d 852.)

Lastly, the Court of Appeals (287 F. 2d 852, at P. 854) affirmed the holding of the District Court that even if the so-called pilotage clause were otherwise regarded as valid, it would not protect Gray from liability for his own fault.

Reasons For Not Granting The Writ

Your Honors should refuse to grant a writ of certiorari in this cause for the following reasons:

1. There was no error in the decisions of the District Court and the Court of Appeals.

2. The opinion of the Court of Appeals is not in conflict with that of any other Court of Appeals or with this Court in any other case.

3. No public interest of importance is here involved.

4. Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings initially made by the District Court on ample evidence, which fact findings were approved by the Court of Appeals as not clearly erroneous; there are no questions to be passed on by this Court.

ARGUMENT

I.

There Was No Error in the Decisions of the District Court and the Court of Appeals

A. The District Court and Court of Appeals were correct in applying the rule of the Bisso Case to the facts here found.

Petitioner assails the holdings of the District Court and the Court of Appeals for failing to apply certain authorities upholding pilotage clauses to the case at bar. However, Petitioner fails to recognize, or recognizing, insists on ignoring the fact that *this situation was found, on competent evidence, by the District Judge, to be one of towage, rather than pilotage*, and this finding was specifically approved by the Court of Appeals. Petitioner apparently is contending that since he called himself a "pilot", called the job which he was performing "pilotage", and called the exculpatory clause in the contract a "pilotage" clause, that pilotage authorities should have been applied in the case, in spite of the fact that the ship had no propulsion or maneuvering power and the Court found the facts to be that such pilotage as is mentioned in Petitioner's authorities

was not here involved. It is submitted that the District Court and the Court of Appeals were eminently correct in applying to the facts of this case the holding of this Court in *Bisso v. Inland Waterways Corporation*, supra, and in distinguishing *Sun Oil Co. v. Dalzell Towing Co.* (2 C.C.A. 1932) 55 F. 2d 63, aff'd. 287 U.S. 291, because the former involved *towage*, and thus was a direct precedent, and the latter involved *pilotage* and thus was not in point. We are unable to find a case in American Jurisprudence holding that a so-called pilotage clause, such as the one here involved, was valid and enforceable under the facts here found by the District Judge on the proofs presented.

The flaw in Petitioner's argument could not be more clearly defined than it was in the words of Judge Joseph Hutcheson, speaking for the Fifth Circuit Court of Appeals in its unanimous opinion in this case where he stated in substance that no matter how one looked at the case, nothing more could be made of it than a mere case of a towing service furnished by G & H and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship. (For the text of Judge Hutcheson's remarks on this subject the Court is referred to Page 4 of this brief where they are quoted in full).

Thus, while it may be true as Petitioner states that it has been held in *Sun Oil Co. v. Dalzell Towing Co.*, supra. and *United States v. Chris Neilson*, 349 U.S. 129, and many other cases that "pilotage" clauses are valid under proper circumstances, it does not follow that a "pilotage" clause will be given effect to enable one party to escape the consequences of his own negligence when it has been

found as a matter of fact on competent evidence that *towage and not pilotage* was involved. The proposition that a tower such as is mentioned in the *Bisso* case may not validly contract against liability for its own negligence has long been a part of the judicially created admiralty law. This rule was first established by this Court in 1871 in *The Steamer Syracuse*, 12 Wall 157, 20 L. Ed. 382. Thereafter, there were some departures from the rule, notably that of the Second Circuit in *The Oceanica*, 170 F. 893, but when the question was next presented to this Court in 1928 in *The Wash Gray*, 277 U.S. 66, this Court emphatically approved the language and holding of *The Syracuse* and repudiated the holding of *The Oceanica*. In 1955, in the *Bisso* case, this Court again considered a release from liability clause in a towage contract. In the *Bisso* case, the Petitioner's barge, while being towed in the Mississippi River by the Respondent's Tug "Cairo", collided with a bridge pier and sank. At the time, the barge had no propulsion power or steering apparatus; her navigation and maneuvers were in complete control of the Tug "Cairo", her master and crew, whose negligence caused the collision. Consequently, Respondent, owner of the Tug "Cairo", would have been liable to pay Petitioner's damages unless relieved of liability by certain clauses in the contract. One of the clauses in question provided that the towing to be performed should be at the sole risk of the tow, and the second clause provided that the masters, crews, and employees of the Tug "Cairo" and her owners should in the performance of the service become and be the servants of the tow. This Court held both clauses invalid and stated that the authorities strongly pointed to the existence of a judicial rule, based on public policy invalidating contracts releasing towers from all liability for their negligence.

It was further stated that the two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. Referring to the fiction of the release clause whereby the tower sought to make his own employees the employees of the tow, this Court stated at Page 95, "The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter 'employment' is purely a fiction."

As clearly illustrated by the *Bisso* opinion, the District Court and the Court of Appeals correctly distinguished the *Sun Oil v. Dalzell* case from the case at bar in the following two vital particulars: (1) in *Sun Oil v. Dalzell*, the ship with her own crew was using her own propulsion and rudder power, thereby retaining control of her own movements, and producing a "pilotage" situation; and (2) in *Sun Oil v. Dalzell*, there was no proof or consideration of a monopoly in favor of the towing company. These two distinctions merit special emphasis here:

> ***Sun Oil v. Dalzell was a true pilotage case, where the ship was using her own propulsion and rudder power, and the towing company, therefore, was merely assisting the ship and did not have complete control of the operation.***

It is, of course, plain from the following language in the *Bisso* opinion (Page 94), that one of the Court's reasons, if not the overriding reason, for invalidating the exculpatory clause in that case was the fact that the vessel

in tow had no propulsion or steering power of her own, or, in other words, that it was a towage case:

> " * * * It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel *on that vessel's own power*. That was the Sun Oil case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employee's negligent towage of a vessel." (Emphasis supplied)

Similarly, in *Sun Oil v. Dalzell*, supra, relied on by Petitioner, this Court in affirming the Court of Appeals which affirmed the District Court which had found that the ship under her own power and maneuverability was being "assisted" by tugs clearly demonstrated that the fact that the Sun Oil vessel *was* using her own propelling power, and was therefore a pilotage case, was a controlling factor in the result. This Court's opinion therein reads in part as follows:

> " * * * It was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to *furnish tugs to assist her while using her own propelling power.*" (Emphasis supplied)

The distinction in the cases lies in the source of control. In *Sun Oil v. Dalzell*, it was found that the ship, having her own propelling and rudder power, retained control of her own movements, and was merely being assisted by the tugs and pilot, and the pilotage clause was held to be valid because it was in fact a pilotage case. In the instant case, it was found as a matter fact on competent evidence (Find-

ing of Fact No. 13, R. 882), that the M/V "Har Canaan" had no propulsion or maneuvering power and that her helm was lashed so that she had no rudder or steering power. As the master of the M/V "Har Canaan" was unable to command the tug (R. 715), and as his ship had no power or maneuverability, neither he nor his crew attempted to, nor could they, nor did they move the ship forward, backward, or to port or starboard. The facts have been found that the entire navigation, maneuvering and movement of the ship was within the complete control of the towing company through its tugs and its regular employee, Captain Emmett Gray, who, as previously pointed out, were exercising actual control of the navigation and maneuvering at the time of the accident, and who remained the servants of the towing company throughout the entire operation. These facts are clearly distinguishable from those in the *Sun Oil v. Dalzell* case, and all others cited by Petitioner, where the ship was using or had available for use her own maneuvering, propulsion and rudder power, and was directing her own maneuvers and navigation and was merely being assisted by the tugs. The facts in the instant case being very closely akin to those in the *Bisso* case, the result was properly held to be governed by the decision therein.

It is of particular significance that all of the cases cited in Petitioner's brief, which uphold pilotage clauses, are cases of true pilotage, where the vessel being assisted was using, or had available for use, her own propulsion and rudder power; indeed, in all of those cases which we have found where litigation over a so-called pilotage clause has arisen, the clause itself has specified that it applied only when the vessel being assisted was using or had available for use her own propulsion power. In the *Niels Finsen*,

(SD NY 1931) 1931 A.M.C. 1014, 52 F. 2d 795, the Court took particular note of this wording in the contract, saying:

> "Does the 'pilotage' change these legal consequences? The purpose of it is, of course, to shield the towing company from liability for the acts of its representative when the latter boards a vessel, *but only, it may be observed, in cases where the vessel is making use of its own propelling power.*" (Emphasis supplied)

The reason for making the distinction between those cases wherein the vessel is making use of her own propulsion and rudder power (pilotage cases) and those wherein she has no propulsion or rudder power (towage cases) is clearly supported by sound public policy; in the one case she has the capacity to extricate herself from situations of peril; in the other case, (as the one at bar), the fate of the vessel in tow is entirely within the control of the towing company through its tugs, their crews, and its so-called dead ship pilot, all of whom are its employees.

The rule of *Sun Oil v. Dalzell,* and similar cases, should be strictly confined to the particular fact situation there involved, as it upholds an exculpatory clause which, historically, are strictly construed by the Courts.

In Sun Oil v. Dalzell there was no proof of the existence of a monopoly in favor of the towing company.

Sun Oil v. Dalzell, as heretofore stated, is distinguishable from the *Bisso* case, and from the instant case by the fact that in the former there was no monopoly involved, whereas in the instant case, as in the *Bisso* case, it was definitely proven that the towing company enjoyed a

monopoly. In commenting upon the absence of a monopoly in *Sun Oil v. Dalzell,* this Court said:

> "Respondents had no exclusive privilege or monopoly in respect to the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept any terms of Respondents' pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Evidently, therefore, this Court left open the validity of the clauses in cases where the parties are not on an equal footing or capable of dealing at arm's length. *Sun Oil v. Dalzell* was decided some 23 years prior to the *Bisso* case, and in the latter, when confronted with an exculpatory clause, this Court specifically struck it down as being against public policy, and expressly stated as one of the reasons for the decision that it was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Mr. Justice Douglas, in his concurring opinion (Page 96) in the *Bisso* case, emphasized the point by quoting with approval the words of Judge Coxe in *The Oceanica, supra,* as follows:

> "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness, and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. *In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precaution to preserve it.*" (Emphasis supplied)

And again, Mr. Justice Black, speaking for the majority in the *Bisso* case, (Page 91) said:

> " * * * And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions."

The Trial Court (Finding of Fact No. 10, R. 880) found the following facts with respect to the status of G & H Towing Co., all of which were clearly supported by the evidence: That the only towing companies offering tug service for shifting ocean going vessels in the Port of Galveston at the time in question were Bay-Houston Towing Company, Sudeman & Young Towing Company, and Intracoastal Towing & Transportation Company; that the services which were available to the owners and operators of ocean going vessels in the Port of Galveston from the three "owning companies" were identical; that this came about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G & H Towing Co., an operating company, which was jointly owned by the three "owning companies"; that in carrying out the orders for towing service, G & H Towing Company would use the tugs which were most readily available and convenient without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed; that the contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner; that the contracts offered by the three "owning companies" were identical in terms, and upon a

single printed form; that the rates were the same, save for an exclusive contract a ten percent reduction was allowed.

The evidence showed and it was found that any so-called competition between the three "owning companies" in the port of Galveston was purely a fiction. The only towing services available in the Port of Galveston were offered by G & H Towing Co., and they involved the same boats, the same rates, the same crews, the same so-called dead ship pilot, and the same contractual conditions (R. 792, 793, 794, 796, 801, 802). It was, therefore, crystal clear that the three "owning companies" and their wholly owned operating company, G & H Towing Co., effectively monopolized the harbor towing business in the Port of Galveston, and that Maritime Overseas Corporation had no freedom to choose a type of contract without such exculpatory provisions. This was the exact situation which this Court in the *Bisso* case was endeavoring to guard against. The steamship companies regularly doing business in the Port of Galveston were required either to submit to this monopoly, and the harsh terms and conditions it exacted, or do without harbor towing services. The latter they could not do, and the former the District Court, with the subsequent approval of the Court of Appeals, correctly held the prevailing authorities did not compel them to do.

The dropping of an anchor by a vessel without power and maneuverability is not pilotage.

Petitioner attempts here, as it did in the District Court and the Court of Appeals, to distinguish this case from the *Bisso* case by making the contention that the negligent act here was one of pilotage rather than towage. It is, of course, clear that the validity of the exculpatory clause here involved cannot depend upon the nature of the par-

ticular negligent act resulting in the damages, but must depend solely upon the general nature of the overall operation. In this instance, the Court has finally determined, on ample evidence, that the case was one of towage and therefore, any act of negligence committed by any employee of the towing company necessarily was one committed in the course of the towage operation. Moreover, reason does not support the contention that the dropping of an anchor is an act of pilotage rather than towage; barges and non-self propelled vessels which are normally towed in American waters today are equipped with anchors available for use, and certainly there is nothing unusual about a tow being anchored during the course of a towage operation. Anchoring a tow does not change its status as a towed vessel. The mere fact that the anchor was on the tow itself, which in many instances is a requisite to seaworthiness, does not make it any less a part of the overall towing job. The important factor in distinguishing between towage and pilotage is that of the location of control: in the former the tow has no propulsion or rudder power, and her entire navigation and management are under the control of the towing company through the latter's employees; in a pilotage situation the vessel has the use of her own propulsion power and steering gear, thereby retaining control of her own movement, and the towing company merely assists that movement.

Petitioner makes the contention that Maritime Overseas Corp. was not required to sign the contract containing the exculpatory clause in order to obtain tug service in the port of Galveston, Texas. We feel that the findings of the Court on competent evidence against this contention has put it at rest, it having found that Maritime Overseas

Corp. had no freedom of choice in the type of towing contract offered, but was required to accept a contract with such exculpatory provisions if in fact it was to secure the tugs to move its ship (Conclusions of Law, R. 886). This finding was based upon well supported evidence (R. 793). Whether a ten percent reduction was allowed in the rate or not (for signing an exclusive contract), any contract under which G & H Towing Co. furnished tugs to move a vessel contained the same exculpatory provision, and no other contract was available because G & H Towing Co. had a monopoly of the harbor towing business in the Port of Galveston.

Summary of the Applicability of the Bisso Rule, and the Reasons for Distinguishing Sun Oil v. Dalzell.

In summarizing the reasons for applying the rule of the *Bisso* case to the facts found in the case at bar, and distinguishing *Sun Oil v. Dalzell*, and related opinions, we cannot improve upon the words of the District Judge found in his Conclusions of Law (R. 885, 886), where he said:

> "In considering the question of liability over between the various respondents, however, the validity of the so-called 'pilotage clause' (Finding No. 11) is placed at issue.
>
> Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, and related opinions immediately following. Respondents G & H Towing and Captain Gray in supporting the

validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an employee of the towing company, and such towing company did 'have power to drive hard bargains'.

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) 'it was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power.'; and (b) 'Respondent had no exclusive privilege or monopoly in respect to the service that Petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

It is, therefore, respectfully submitted that the decisions of the District Court and Court of Appeals, holding under the facts of this case that the so-called pilotage clause did not exculpate Petitioners, are entirely in accord with the settled American maritime law governing in circumstances such as these.

B. Even if the so-called Pilotage Clause were valid, it would not preclude the award of indemnity to Maritime Overseas Corporation against Emmett Gray for the in rem liability imposed against the M/V "Har Canaan" by reason of Gray's negligence, because Gray was not a party to the contract, and it was not made for his benefit.

The District Court held that since Petitioner, Captain Gray, was not a party to the contract in which the alleged exculpatory clause appeared, and since the contract was not made for his benefit, it did not preclude an award of indemnity to Maritime Overseas Corporation against Captain Gray for the in rem liability imposed against the M/V "Har Canaan" solely by reason of Gray's negligence. (R. 873). The Court of Appeals specifically affirmed this holding, saying (287 F. 2d 852, at P. 854):

> "We are also of the opinion that there is no merit whatsoever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid."

Nevertheless, the Petitioner, Emmett Gray, now makes the entirely specious contention that the so-called pilotage clause (which purports to make the said Emmett Gray an employee of Maritime Overseas Corporation) was binding upon Maritime Overseas Corporation so as to render the latter personally liable for damage to the pipeline due to his (Gray's) negligence, but that he (Gray) is nevertheless entitled to the purported protection of the same clause insofar as it states that certain named beneficiaries therein will not be liable for damages by the so-called dead ship pilot. In other words, Gray says that by virtue of the so-

called pilotage clause, he was an employee of Maritime Overseas Corporation, but that since he was not in fact an employee of Maritime Overseas Corporation, he was entitled to the protection the said clause purportedly afforded. This argument obviously has no foundation in law or justice. Assuming, arguendo, that the so-called pilotage clause were valid, then Gray would be the employee of Maritime Overseas Corporation, and would not be entitled to any so-called exemption as an employee of G & H Towing Co. On the other hand, if the clause were invalid (as the courts below have properly held it to be), then Gray would still be an employee of G & H Towing Co., and no protection would be afforded to him or to his employer, G & H. Whether Gray was an employee of Maritime Overseas Corporation, or of G & H Towing Co., he was personally liable to Maritime Overseas Corporation as the sole wrongdoer. Just as Maritime Overseas Corporation could have a recovery for indemnity against its own master if his negligence had been found to be the sole cause of the damages, it could have the identical recovery against Gray whether Gray were held to be its employee or not. Moreover, Gray did not qualify as one of the named beneficiaries within the wording of the so-called pilotage clause, i.e., he was not one of the "tugs or their owners, agents, masters, servants, employees or charterers".

It is fundamental law that one seeking to take advantage of a contract made for his benefit by another must take it subject to all of its terms and conditions. See 17 *C. J. S.*, Contracts, Section 529; *Pennsylvania Cement Co. v. Bradley Contracting Co.* (2 CCA 1925), 7 F. 2d 822; *Burke v. Scott* (CCA Texas 1951) 237 S.W. 2d 655. Thus, if Petitioner, Emmett Gray, asked for the purported pro-

tection of the so-called pilotage clause, he would also be bound by that part of the same clause purporting to make him an employee of Maritime Overseas Corporation; if he were an employee of Maritime Overseas Corporation, then obviously he could not at the same time be an employee of G & H Towing Co. or a beneficiary under the contract. Even in those cases where a pilotage clause has been held to be valid, that is, those of true pilotage, in which the ship was using her own propulsion power and rudder, and remained in the control of her own master and crew, and the parties had dealt at arm's length, indemnity has been awarded to the shipowner against the pilot for all sums for which the shipowner had been required to indemnify the towing company. See *"Gypsum Queen"—Tug "Peerless"* (E.D. Va.) 1953 A.M.C. 2071 (no other citation available); *People of the State of California v. The Steamship "Jules Fribourg"* (N.D. Cal.) 1956 A.M.C. 939, 140 F. Supp. 333.

C. The District Court and the Court of Appeals correctly awarded indemnity to Maritime Overseas Corporation against Captain Emmett Gray for the in rem liability imposed against the M/V "Har Canaan" solely by reason of Gray's negligence.

In his petition, Argument, Article III, Emmett Gray makes several statements of fact which are not supported by the record, and which in fact are directly contrary to the findings of the District Court made on competent evidence and approved by the Court of Appeals. It is not true, as Petitioner states, that the M/V "Har Canaan" was being commanded by her master during the entire

time of her towing operation; that the master approved in advance the use of the ship's anchor; that Emmett Gray was acting only in an advisory capacity; or that the master, and not Emmett Gray, ordered the anchor dropped. The true facts, as found by the District Court, and approved by the Court of Appeals, are that Petitioner, Captain Emmett Gray, not the master, was conning the ship throughout this entire operation (Finding of Fact No. 13, R. 882). Although the Master of the M/V "Har Canaan" was on her bridge, he was not commanding the ship as the ship did not have the use of her own propulsion or rudder power and was being moved solely by the tugs, which the master was unable to, and did not command. (R. 715). Captain Gray simply went aboard the ship and advised the master that the anchor would be used when the ship was docked, and to have it ready (Finding of Fact No. 13, R. 882, and see also R. 670). Captain Gray was directing the entire movement, and was not acting in any advisory capacity; it was Gray, not the master, who gave the order to drop the ship's anchor, as found by the District Court in no less than four separate fact findings (Findings of Fact No. 17, 18, and 21, R. 883, 884).

Petitioner states that the Court of Appeals' decision is based upon a holding that Petitioner was not a compulsorily employed pilot, and that Petitioner was a pilot voluntarily engaged for the convenience of the ship. Neither of these statements is supported by the record. A reading of the opinion clearly shows that the Court of Appeals' decision is not based upon the fact that Petitioner was not a *compulsory* pilot, but that *he was not a pilot at all.* This is plain from the language used by Judge Hutcheson at page 854 of the Court of Appeals' opinion, where, refer-

ring to the status of Captain Gray, he stated that although Gray was denominated a "pilot", he was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship. Moreover, Captain Gray was not voluntarily engaged for the convenience of the M/V "Har Canaan". As a matter of fact, no request was made by Maritime Overseas Corporation for Gray's services, and he was completely unknown to Maritime Overseas Corporation until he boarded the ship to take charge of the towing operation. Captain Gray was not employed as a pilot by Maritime Overseas Corporation, and the latter exercised no control over his actions. Neither was any pilotage fee paid to Gray by Maritime Overseas Corporation. Gray was furnished automatically by G & H Towing Co., for its own convenience, and on its own initiative, whenever it received any request to move a dead ship. (R. 726). Inasmuch as G & H Towing Co. had a monopoly of the harbor towing business in the Port of Galveston (Finding of Fact No. 10, R. 880 and Conclusions of Law, R. 886), Maritime Overseas Corporation was obliged to accept Captain Gray along with the tugs furnished by G & H Towing Co.

Since the District Court found, on competent evidence, that the damage to the pipeline was caused solely by the negligence of Captain Gray, as an employee of G & H Towing Co., that the master of the M/V "Har Canaan" was not negligent in failing to intervene or displace Captain Gray, (Finding of Fact No. 21, R. 884), and that neither the master nor any member of the crew of the M/V "Har Canaan" was negligent in any particular (Finding of Fact No. 22, R. 884), and these findings were approved by the Court of Appeals, it is clear that Maritime Overseas Corporation could not have been held per-

sonally liable. Petitioner's contention now made that Respondent was a joint tort feasor through the negligence of the master is foreclosed. All of those cases which Petitioner cites in his brief have to do with independent state licensed pilots voluntarily employed and paid for by vessels having the use of their own propulsion and rudder power and under the direct control of their own crews. They are not cases, such as the one at bar, of towage, where the ship, without power, self propulsion, rudder, or self maneuverability was being navigated and maneuvered dead, entirely under the control of a towing company through its tugs and through its employee furnished to direct the towing operation. Accordingly, such cases cited by Petitioner are not in point.

Although the courts below have declined to hold Maritime Overseas Corporation personally liable for the damages to the pipeline because there was no negligence upon the part of the master or crew of the M/V "Har Canaan" the Courts have imposed in rem liability against the M/V "Har Canaan" solely by reason of the negligence of Captain Gray who was directing the movement of the vessel. While the District Court and Court of Appeals have held that the in rem liability of the M/V "Har Canaan" was joint and several with that of Captain Gray and his employer, G & H Towing Co., they have not held that Maritime Overseas Corporation, claimant of the M/V "Har Canaan", was a joint tort feasor, and correctly so. Petitioner, Gray, cites *Halcyon Lines v. Haenn Ship Sealing & Refitting Corp.*, 342 U.S. 282, presumably as authority for the contention that the courts below erred in granting to Maritime Overseas Corporation indemnity against Petitioner. The *Halcyon* case holds, at most, that there is no

contribution between joint tort feasors in admiralty in non-collision cases. Thus, in citing the *Halcyon* case, Petitioner makes three erroneous assumptions: first that this case involves joint tort feasors, second, that it involves contribution, and lastly, that it is not a collision case. A joint tort feasor situation does not arise unless the Court finds concurrent negligence of two or more persons combined resulting in an injury to a third person, and in that event, those persons concurrently negligent are jointly and severally liable, and the injured person may recover from either or all. 65 *C.J.S.* Negligence, Section 102, page 639. In the instant case, the Courts below have specifically found on competent evidence that the master and the members of the crew of the M/V "Har Canaan" were not negligent, and have held that Maritime Overseas Corporation, claimant of the M/V "Har Canaan", was not personally liable. The liability of the M/V "Har Canaan", in rem, therefore, was predicated solely upon the negligent act of Captain Emmett Gray, an employee of G & H Towing Co., and not upon any negligence of anyone for whom Maritime Overseas Corporation was personally responsible. The simple holding that the vessel was jointly liable in rem is not tantamount to a holding that the vessel or its claimant was a joint tort feasor, or committed acts of concurrent negligence, nor could any such contention be seriously made. Inasmuch as the *Halcyon* decision involved *joint tort feasors and contribution*, not *joint liability and indemnity* (as does the instant case), the *Halcyon* case is clearly distinguishable.

There have been numerous cases since the *Halcyon* decision which have allowed indemnity to one of two parties held to have been jointly and severally liable on either

or both of two bases: First, on the basis of the breach of an implied contractual obligation or warranty by the person who undertakes or agrees to do a job (as G & H Towing Co. agreed here to shift Maritime Overseas Corporation's ship) that he will do the job or perform the service in a reasonably safe manner and/or in such a manner as not to cause injury or damage to third parties; and second, on the basis that one party held to be jointly and severally liable with another was guilty of only secondary or passive tortious conduct, whereas the other party was guilty of primary or active tortious conduct. Neither of these two situations involves joint tort feasors, but only joint liability. Maritime Overseas Corporation, under the facts of the case at bar as found by the District Court on competent evidence, qualifies for indemnity under either category. See *Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation*, 350 U.S. 124; *States S. S. Co. v. Rothschild International Stevedoring Co.* (9 C.C.A. 1953), 205 F. 2d 253 (where Halcyon was distinguished); *Brown v. American Hawaiian S. S. Co.* (3 C.C.A. 1953) 211 F. 2d 16; *Horan v. Pope & Talbot* (E. D. Pa.), 1953 A.M.C. 2157, 115 F. Supp. 32; and *Davis & Mattison v. Am. Pres. Lines* (N.D. Cal.), 1952 A.M.C. 818, 106 F. Supp. 729.

How could it be seriously argued, that if indemnity is allowable between active and passive tort feasors, it would not be allowed to litigants such as Maritime Overseas Corporation in the instant case, who was found, on sufficient evidence, not to have been guilty of any negligence, whose only liability, which is in rem, is one created by operation of law solely through the negligent act of another, because it owned the ship and thus it is not a tort feasor at all, but merely jointly liable?

Finally, it is respectfully submitted that Petitioner, Emmett Gray, has inferentially admitted in his petition that contribution and/or indemnity is allowed in collision cases. By arguing along the lines of the *Halcyon* case, Petitioner apparently assumes that this is not a collision case. However, it is respectfully submitted that this is a collision case, and in all respects governed by collision principles. We cannot perceive any difference between this case, where an anchor, an integral part of the ship, struck a fixed pipeline, and those cases where a ship, or some part thereof (a gangway, for instance), strikes a bridge, a pier, a jetty or some other structure affixed to the land. Admiralty has had jurisdiction of these controversies since 1948 under 46 U.S. C.A., Section 740, and they have been uniformly treated as collision cases, which they are, and all admiralty principles such as those of statutory fault, divided damages, etc. uniformly applied to them by the Courts. It is, accordingly, clear that the District Court and the Court of Appeals were correct in awarding indemnity to Maritime Overseas Corporation against Petitioner, Emmett Gray, for the in rem liability imposed against the M/V "Har Canaan" by reason of Gray's negligent act.

II.

The Opinion of the Court of Appeals is not in Conflict With that of Any Other Court of Appeals or of this Court in Any Other Case.

Clearly, the opinion of the Court of Appeals in this case is entirely in conformity with the prevailing law as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, the case having been determined on competent evidence as a matter of fact to be one involving towage.

The decision is not in conflict with that in *Sun Oil Co. v. Dalzell,* or the cases following it, because those cases involve, as a matter of fact, pilots on vessels being assisted while under their own propulsion power and maneuverability, and not towage. Indeed, there is a marked uniformity in the authorities throughout the country whereby an exculpatory clause, that is a clause purporting to release a party from liability for damages for its own negligence, is held to be invalid as against public policy when towage is involved. This case, having been determined to be one of towage, falls under that line of authority in which the exculpatory clause is held invalid.

However, if this Court should believe that there are facts present in this case which render it substantially distinguishable from the *Bisso* case, and yet do not bring it within the purview of the rule announced in *Sun Oil v. Dalzell,* then it is respectfully submitted that it would be a novel case, and that the law governing in such situations has been determined by the Fifth Circuit Court of Appeals by its opinion in this case. That opinion, in view of its novelty, would not be in conflict with any other decision of any other Circuit Court of Appeals or of this Court. Accordingly, for this reason, the writ should be refused.

III.

No Public Interest of Importance is here Involved.

Petitioner is endeavoring to have a clause, sometimes held exculpatory in true *pilotage* situations, declared to be effective to relieve a towing company for negligent *towage.* We have been unable to find a case where this was done and Petitioner has cited none. Indeed, in almost all cases

now on record, where litigation involving such a pilotage clause has arisen, the clause itself has provided that it is effective when the vessel being assisted had the use of her own propulsion power, or in other words, what we refer to as pilotage cases. Certainly the clause here asserted by Petitioner to be involved is not in wide use, if indeed it is in use in any port except Galveston, Texas. The circumstances that the engines and rudder of the "Har Canaan" were inoperative, combined with the occurrence of a rather freakish accident (the breaking of a poorly marked submarine pipeline by a ship's anchor), occurring in a harbor where a monopoly of harbor towing business existed in favor of a single towing company, gave rise to the issues of cross-liabilities and indemnity in this litigation. The unusual circumstances which gave rise to these issues are not likely to occur with frequency, and would concern only a small segment of the marine industry in isolated instances. Certainly there are no issues here involved which would be of importance to the general American public.

IV.

Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings amply supported by the evidence, and not clearly erroneous, there are no questions to be passed on by this Court.

The law is clear that on a question of fact this Court will accept the concurrent findings of the District Court and Circuit Court of Appeals supported by substantial evidence. *The "Linseed King"* (N.Y. 1932), 285 U.S. 504; *Graver Tank and Mfg. Co. v. Linde Air Products Co.*,

(Ind. 1959) 336 U.S. 271; *Alabama Power Co. v. Ickes* (1938) 302 U.S. 464.

At the risk of being burdensomely repetitious, it is again respectfully pointed out to the Court that the District Court, on well supporting evidence, found, as a matter of fact, that the situation here involved was one of towage, rather than pilotage, and that the exculpatory clause was inapplicable under the facts as they found them. These fact findings were specifically approved by the Court of Appeals. The District Court applied the well settled law, as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, supra, that a tower cannot effectively release himself from liability for negligence of his own employees. The Court of Appeals approved the fact findings and this application of the settled law. This effectively disposes of, and indeed precludes, under the authorities cited above, any further consideration by this Court of the points which Petitioner attempts to raise in this petition.

Conclusion

Maritime Oveaseas Corporation respectfully submits that the judgment of the Court of Appeals, and the judgment of The District Court, are correct; that their holdings are not in conflict with, nor are they in any way contrary to, any prior decision of other Courts of Appeal or of this Court, but are in conformity with such decisions; that the decisions of the District Court and of the Court of Appeals in this case are the result of the application of well settled legal principles to findings of fact amply supported by the evidence; that the case involves no matters of general public interest of importance, and that the decisions are not contrary to any precedents or public interest that

require their correction by the exercise of this Court's power of supervision.

Respectfully submitted,

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Certificate

I certify that a copy of the foregoing Brief of Maritime Overseas Corporation in opposition to the Petition for Writ of Certiorari of Emmett Gray, has been mailed to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Petitioner, G & H Towing Company and Petitioner, Emmett Gray, Royston, Rayzor & Cook, Cotton Exchange Building, Galveston, Texas, Attorneys for Petitioner, G & H Towing Company, and to McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, Attorneys for Respondents, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corp., and Pelican Island Development Corporation, this 28th day of August, 1961.

CLARENCE S. EASTHAM